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No. 54

In the Supreme Court of the United States

OCTOBER TERM, 1929

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA, AT THE RELATION OF CITY OF LOS ANGELES, A MUNICIPAL CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF OF INTERSTATE COMMERCE COMMISSION

DANIEL W. KNOWLTON,
For Interstate Commerce Commission.

SUBJECT INDEX

	Page
OPINIONS	1
JURISDICTION	1
QUESTION	2
THE STATUTES	2
STATEMENT	8
ASSIGNMENT OF ERRORS	15
ARGUMENT	15
SUMMARY	15
I. CONGRESS HAS NOT AUTHORIZED THE COMMISSION TO REQUIRE THE BUILDING OF NEW UNION STATIONS IN LIEU OF EXISTING INDIVIDUAL TERMINALS, AND A POWER OF SUCH FAR-REACHING SCOPE SHOULD NOT BE READ INTO THE ACT	17
1. The Court of Appeals and respondent point to no explicit language empowering the commission to order the building of union stations, but, instead, rely upon various inapt provisions added by the transportation act, 1920, or upon provisions of uncertain scope contained in the early act, originally put there and also reenacted in 1920, without thought of conferring any such authority	20

Argument—Continued.
SUMMARY—Continued. Page

2. The decision of this court, in the Los Angeles Station Case, that the commission has "means of control over installation of such new union station" in that its permission for incidental extensions and abandonments of lines and for issuance of new securities, if needed, must first be obtained, manifests that commission authority is indirect and restrictive and that it is not a mandatory authority to order the building of new union stations 37

3. The decision in the Los Angeles Station Case, indicating that the commission's control over the installation of new union stations was of permissive and restrictive rather than mandatory character, gives effect to the fact that, while the 1920 amendments to the act extended the Federal regulatory authority in marked degree, still, and doubtless for that very reason, it was the congressional plan to give to the commission a restrictive instead of initiative power over subject-matter intimately affecting local interests or constituting extensive invasions into a field theretofore left to private initiative and managerial discretion, whenever power of that character was fitted to accomplish the end in view 48

Argument—Continued.

SUMMARY—Continued.

Page

4. If it should be considered that the State has been altogether excluded and is without power to order installation of the new union station even after obtaining this commission's certificates in respect of relocation of main line track, still this commission's mere indirect and restrictive authority to prevent a change in existing status would not be thereby changed into a mandatory power to force new union stations in lieu of existing stations upon the carriers and the cities 55

TABLE OF CASES CITED

Alabama Ry. v. Jackson Ry., 271 U. S. 244 ..... 29, 34, 36
A., T. & S. F. Ry. v. R. R. Comm. of Calif., 190 Cal. 214 9
Chicago Junction Case, 264 U. S. 258 54
Colorado v. United States, 271 U. S. 153 54
Dayton-Goose Creek Ry. v. United States, 263 U. S. 456 54
Duplex v. Deering, 254 U. S. 443 33
Houston & Texas R. Co. v. United States (Shreveport Case), 234 U. S. 342 50
Ill. Cent. R. Co. v. Pu. Utility Comm., 245 U. S. 493 55
Kentucky & I. Bridge Co. v. L. & N. R. Co., 37 Fed. 567 (149 U. S. 777) 28
Lehigh Valley R. Co. v. Pub. Utility Comm., 278 U. S. 24 ..... 34, 46, 49, 55
Los Angeles Passenger Terminal Cases, 100 I. C. C 421, 142 I. C. C. 489 ..... 1, 12, 14, 20
Los Angeles Valuation Case, 273 U. S. 299 51
M. K. & T. R. Co. v. Haber, 169 U. S. 613 55
M. K. & T. R. Co. v. Harris, 234 U. S. 412 55
Mo. Pac. Ry. v. Larrabee Flour Mills Co., 211 U. S. 612 55
New England Division Case, 261 U. S. 184 54
New York Central v. Winfield, 244 U. S. 147 ..... 56, 58, 59
N. C. Corp. Comm. v. Southern Ry., 185 N. C. 453 33
Prigg v. Pennsylvania, 16 Pet. 536 ..... 57, 58
R. R. Comm. of Calif. v. Southern Pac. Co. (Los Angeles Station Case), 264 U. S. 331 ..... 10, 15, 16, 21, 34, 37–48, 51, 59
Savage v. Jones, 225 U. S. 501 ..... 19, 55

Page

Snyder v. *New York, C. & St. L. R. Co.*, 118 Ohio St. 72 (278 U. S. 578) 53, 54, 57, 61
Sligh v. *Kirkwood*, 237 U. S. 52 55
Texas v. *East. Tex. R. Co.*, 258 U. S. 204 54
U. S. v. *Penn. R. Co.*, 242 U. S. 208 24
Venner v. *Mich. Cent. R. Co.*, 271 U. S. 127 54
Wisc. R. R. Comm. v. *C., B. & Q. R. Co.*, 257 U. S. 563 50

STATUTES CITED

Commerce Court act of 1910 (36 Stat. 539) 50
Federal employers' liability act (35 Stat. 65; 36 Stat. 291) 56
Hepburn Act of 1906 (34 Stat. 584) 51
Panama Canal act of 1912 (37 Stat. 566) 50
Interstate commerce act, as amended (24 Stat. 379; 41 Stat. 456)—
Sec. 1 (17) (41 Stat. 477) 42, 49
Sec. 1 (18 to 22) (41 Stat. 477, 478) 3–6, 10, 21, 35, 36, 38, 39, 41, 44, 45, 51
Sec. 3 (3) (24 Stat. 379; 41 Stat. 479) 6, 21, 22, 27, 28, 29, 34
Sec. 3 (4) (41 Stat. 479; 480) 7, 21, 22, 34, 35, 37, 39
Sec. 5 (1 to 8) (41 Stat. 481, 482) 50
Sec. 5 (9) (42 Stat. 27) 50, 52, 57, 58, 61
Sec. 12 (25 Stat. 858) 7, 8, 23, 24, 25, 27, 30
Sec. 13 (3) (41 Stat. 484) 49
Sec. 15 (1) (34 Stat. 584; 41 Stat. 484, 485) 24, 25
Sec. 15 (6) (41 Stat. 486) 50
Sec. 15a (5 to 9) (41 Stat. 489, 490) 50
Sec. 20a (41 Stat. 494–497) 45, 46

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No. 54

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UNITED STATES OF AMERICA, AT THE RELATION OF City of Los Angeles, a Municipal Corporation, respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF OF INTERSTATE COMMERCE COMMISSION

OPINIONS

No opinion was rendered by the Supreme Court of the District of Columbia. The opinion of the Court of Appeals has not been published but will be found beginning at page 163 of the record. The Commission's two reports herein involved, *Los Angeles Passenger Terminal Cases*, 100 I. C. C. 421 and 142 I. C. C. 489, will be found at pages 49–96 and pages 129–147 of the record.

JURISDICTION

By petition filed July 12, 1928, respondent sought from the Supreme Court of the District of Columbia

a writ of mandamus compelling petitioner, Interstate Commerce Commission to consider the evidence in certain proceedings before it for the purpose of determining whether the Commission should issue an order requiring certain railroads to build and use a union passenger station in the City of Los Angeles, California. The judgment of the Supreme Court of the District of Columbia dismissing said petition was entered October 18, 1928. Upon appeal this judgment was reversed by judgment of the Court of Appeals of the District of Columbia, entered February 25, 1929.

The Commission filed its petition for writ of certiorari under subsection (a) of section 240 of the Judicial Code as amended and reenacted by the Act of February 13, 1925 (c. 285, 43 Stat. 936, 938), and said petition was granted by this Court April 15, 1929.

QUESTION

Whether the Commission has the direct and affirmative authority to require railroads serving a city to construct a new union passenger station and use the same in lieu of their existing terminals.

THE STATUTES

Pertinent provisions of the Interstate Commerce Act (24 Stat. 379) as amended by the Transportation Act of 1920 (41 Stat. 456) are paragraphs (18)–(22) of section 1 and paragraphs (3) and (4) of section 3, and a part of section 12.

Section 1 (18)–(22) of the Act read as follows:

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is pro-

posed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or

any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or persons, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

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(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

Section 3 (3) and (4) read as follows:

(3) All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

(4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by an-

other carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

Section 12 reads as follows (the portion relied upon by respondent is shown in italics):

(1) That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is con-

ducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; *and the Commission is hereby authorized and required to execute and enforce the provisions of this Act;* and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act, and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this Act the Commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

STATEMENT

The controversy had its inception in a proceeding instituted before the Railroad Commission of California by certain civic bodies of the City of Los Angeles against the Atchison, Topeka & Santa Fe Railway Company, the Southern Pacific Company, and Los Angeles & Salt Lake Railroad Company,

hereinafter called the Southern Pacific, Santa Fe, and Salt Lake, respectively. In that proceeding the State Commission ordered those carriers to acquire sufficient land within what is known as the plaza area in said city for a union passenger station and terminal, to submit plans therefor, and upon their approval by that commission to proceed with the construction of the station. (R. 51, 52.)

The carriers took this order by writs of review to the Supreme Court of California and that court in *A., T. & S. F. Ry.* v. *Railroad Comm. of Calif.*, 190 Cal. 214, held that the Transportation Act, 1920, had vested authority over the matter of union terminal depot facilities of interstate carriers in this Commission, thereby divesting the State Commission of the jurisdiction which it had sought to exercise. Upon petition of the State Commission, this Court granted writs of certiorari in respect of this decision.

Meanwhile the City of Los Angeles filed complaint with this Commission, asking in substance that said carriers be required to construct a union passenger station within the plaza area and to acquire the land necessary therefor, and that they be required and permitted to make such extensions and abandonments of lines and to arrange for such joint use of terminal tracks and facilities as might be necessary or incidental to the establishment of such union station.

On April 7, 1924, this court rendered its decision in the above-mentioned certiorari proceeding, *Rail-*

road Comm. of Calif. v. *Southern Pac. Co.*, 264 U. S. 331, wherein the court, in affirming the judgment of the State court, held in substance that the relocation of tracks, which were necessarily incidental to the proposed union passenger station, required a certificate of this Commission under paragraphs (18) to (21) of section 402, Transportation Act, 1920 (paragraphs (18) to (21) of section 1, Interstate Commerce Act as amended), as a condition precedent to the validity of any action by the carriers or of any order by the State Commission (346), and that until the Commission had acted under said paragraphs (18) to (21) the carriers could not be required to provide a new union station and to extend their main tracks thereto as ordered by the State Commission (348). The court had theretofore said (344) in respect of said paragraphs (18) to (21) that—

> * * * They provide that no interstate carrier shall undertake the extension of its line of railroad or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation over such additional or extended line of railroad, unless and until the Commission shall certify that public convenience present or future requires it, and that no carrier shall abandon all or any portion of its line or the operation of it without a similar certificate of approval. Such a certificate is, we think, necessary in the construction of a new interstate union

> station which involves a substantial and expensive extension of the main tracks or lines of interstate carriers who theretofore have maintained separate terminals.

thereby showing that the reason why the action of this Commission was a prerequisite to the building of the union passenger station was not because of any direct power to order the carriers to abandon existing terminals and to cooperate in the building of the new union station, but was because the Commission is vested with indirect means of control in respect of any such project, growing out of its power under said paragraphs (18) to (21) to grant or withhold authority for the incidental extensions and abandonments of lines, coupled with the injunction laid upon it by paragraph (21) that it may authorize or order extensions of lines only where it finds that the expense involved will not impair the carriers' ability to perform their duties to the public.[1]

After this court had rendered its said decision the proceeding instituted before the Commission by the City of Los Angeles, asking for an order requiring the railroads to build a new union station at the plaza site, was heard. With it were consolidated an application by the Southern Pacific for

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[1] Under said paragraph (21) the Commission may also order a carrier "to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act." The term "car service" as used in the Act relates to *vehicles* used in the transportation of *property*. (Sec. 1 (10).)

authority to abandon certain mainline track and the operation of passenger and freight train service (except freight switching service) on Alameda Street and an application by the Southern Pacific and the Salt Lake for authority to construct new, and to extend existing lines, so as to permit the joint use by said railroads of the Southern Pacific's existing passenger station. This Commission, in its report, (100 I. C. C. 421) held that it was without authority to require the construction of the new union station. In respect of this feature the report reads at p. 430:

> We conclude that we are not empowered to require the construction of a union passenger station as sought in No. 14778. To make the record clear, we repeat that, no question of discrimination or preference is presented here; and that under the issues framed in the complaint in No. 14778 we will give no consideration to matters shown of record for the purpose of determining whether we should issue an order *requiring* the construction and use of a union station by any of the defendants. (R. 58.)

However, in line with this court's interpretation of its authority the Commission made findings which may be summarized as follows: (1) That the public convenience and necessity require the extensions of lines that may be necessary to reach and serve any union passenger station within the plaza area constructed in accordance with a lawful order of the State Commission and that may be necessary to provide for the incidental rearrangement of pas-

senger and freight routes, and that the expense involved will not impair the carriers' ability to perform their duties to the public. (2) That public convenience and necessity permit the abandonment of train service on Alameda Street and such other abandonments of lines as would be necessary in connection with the establishment of any such station, so lawfully ordered by the State Commission. The report further found that such joint use of track or other terminal facilities as may be incidental and necessary to the proper operation of any such union station is in the public interest and is practicable, without substantially impairing the owning carriers' ability to handle their own business. As to the application by the Southern Pacific and Salt Lake to extend their lines to permit the joint use of the Southern Pacific's existing station, the Commission's findings were unfavorable and its order denied the application. The Commission's then report was not accompanied by certificates carrying out its findings, and it reserved jurisdiction to alter its findings in the event that the plan of the State Commission, as finally evolved, should be materially different from that "as here considered to be in the public interest." R. 89.)

Thereafter the State Commission reopened its proceeding, and, after further hearing, rendered a decision making the same findings as this Commission and, in addition, findings to the effect that public convenience and necessity required the con-

struction of a union passenger station within the plaza area, which, in its opinion, could be done at a cost of $10,000,000 in substantial compliance with a plan prescribed by it. (R. 17, 18.) The State Commission issued its order for the carrying out of its findings, which order, however, was to become effective only after this Commission had issued its certificates or orders covering, not alone the extensions and abandonments of tracks involved, but likewise the construction of the union passenger station. (R. 120.)

The City of Los Angeles and the State Commission thereupon filed petitions with this Commission asking that certificates be issued in accordance with the findings theretofore made and, further, for an order requiring the carriers to construct and operate a union passenger station in compliance with the said plan of the State Commission. (R. 19.) After further hearing the Commission reaffirmed its findings theretofore made and issued certificates in conformity therewith. Likewise it adhered to the conclusions expressed in its earlier report that it was without authority "to require the construction of a union passenger station of the character sought by the complaint." *Los Angeles Passenger Terminal Cases,* 142 I. C. C. 489. (R. 139.) And it, accordingly, refused to issue an order for the construction thereof.

The case was submitted in the Supreme Court of the District of Columbia upon the petition for writ of mandamus and exhibits thereto attached,

the rule to show cause, the answer of the Interstate Commerce Commission and the demurrer to said answer. On October 18, 1928, said court entered judgment overruling the demurrer and dismissing the petition.

On the appeal, that judgment was reversed by judgment of the Court of Appeals of the District of Columbia. The accompanying opinion held in substance that this Commission was clothed not only with supervisory control over the construction of union passenger stations, growing out of its power to grant or withhold permission for the rearrangement of main line track incidental to the establishment of such station, but that it likewise had the direct and affirmative authority to require the carriers to construct and establish new union passenger stations.

ASSIGNMENT OF ERRORS

The Court of Appeals of the District of Columbia erred in holding that the Commission was clothed with authority to require the carriers to construct the union passenger station, and in construing the decision of this court in *R. R. Comm. of Calif.* v. *Southern Pac. Co., supra,* as supporting that holding.

ARGUMENT

SUMMARY

1. Since exercise of a power to compel establishment of new union stations in lieu of existing individual stations would vitally affect local interests

and would encroach upon authority heretofore exercised by the States, the lower court's decision, finding the Commission clothed with such authority, is in square conflict with the settled rule that Federal legislation trenching on state authority must be strictly construed, in that said decision rests, not on express language conferring such power, but instead upon various inapt provisions added by the Transportation Act, 1920, or upon provisions of uncertain scope in the early Act, originally put there, and also shown to have been reenacted in 1920, without thought of conferring any such authority.

2. The decision of this Court, in the *Los Angeles Station case*, that the Commission has "means of control over installation of such new union station" in that its permission for incidental extensions and abandonments of lines and for issuance of new securities, if needed, must first be obtained, manifests that Commission authority is indirect and restrictive and that it is not a mandatory authority to order the building of new union stations.

3. The conferring by Congress of a permissive and restrictive authority in this field is in line with its past policy, which has customarily been to give to the Commission a limited power only in the first instance, and that when and if later enlarging that power, to employ express and unmistakable language, including specific provisions for notifying and according hearing to the states, or for securing their cooperation; it is also in harmony with the

general Congressional plan of the 1920 amendments (particularly as evidenced by the consolidation provisions of the Act), to give to the Commission permissive and restrictive authority rather than a compulsory authority over subject-matter intimately affecting local interests or constituting extensive invasions into a field theretofore left to private initiative and managerial discretion, whenever power of that character was fitted to accomplish the end in view.

4. If it should be considered that the State has been altogether excluded and is without power to order installation of the new union station even after obtaining this Commission's certificates in respect of relocation of main line track, still the Commission's mere indirect and restrictive authority to prevent a change in existing status would not be thereby changed into a mandatory power to force new union stations in lieu of existing stations upon the carriers and the cities.

I

CONGRESS HAS NOT AUTHORIZED THE COMMISSION TO REQUIRE THE BUILDING OF NEW UNION STATIONS IN LIEU OF EXISTING INDIVIDUAL TERMINALS, AND A POWER OF SUCH FAR-REACHING SCOPE SHOULD NOT BE READ INTO THE ACT

The Commission was created by Congress, and, if it is clothed with the power to require railroads to abandon their existing stations and terminal tracks in a city and to combine for the purpose of establishing in lieu thereof a new union station at a

new site, that power must be found in the acts of Congress. Such authority, if possessed, would obtain in respect of all railroad junctions, including the innumerable large cities of the country with their residential, commercial, shopping, and municipal centers fixed and established with relation to existing terminals, their great buildings peculiarly adapted to the particular centers in which they stand, and their complicated local transportation and traffic problems now adjusted to existing terminals and established centers. All these local interests would be vitally affected by the substitution of a union station for present terminals. An unwise selection of its site from the standpoint of the city might badly disrupt property values and likewise the local transportation systems. It might call for terminal tracks over rights of way not best fitted to the safety of the city's streets, or for viaducts or tunnels in localities poorly adapted to the convenience and best interests of the city. Moreover, regarding the matter solely from the standpoint of the railroads, authority in the Commission to require them to build new union stations is not a matter which Congress would have been likely to leave to inference. Its exercise would compel them to abandon existing terminals and rights of way, to acquire new land and rights of way and enter upon new construction, the new undertakings to be cooperative and, therefore, necessarily entailing either that the Commission determine the indi-

vidual investments in, and the extent of the use to be made by each carrier of, the joint property or that those matters must be settled by voluntary adjustment.

By reason of its power to grant or withhold permission for the incidental rearrangement of main line track the Commission is now possessed of an indirect means of control over the establishment of union stations whereby it may prevent the same if it considers that it would result detrimentally to the interests of interstate commerce. But the effect of the exercise of that indirect and restrictive means of control would merely be to preserve the existing status of the railroads and cities affected. A direct and mandatory authority to order the establishment of the union station itself, entailing the abandonment of old, and the cooperative acquisition of new, properties and facilities and the disruption of the internal arrangements of the cities, is obviously quite a different thing. If it had been intended to clothe the Commission with authority of such new and extensive character unquestionably the intention would have been expressed in plain terms and would not have been left to be implied from varied regulatory provisions of uncertain scope.

As said in *Savage* v. *Jones,* 225 U. S. 501, at page 533:

> But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not

> to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State. This principle has had abundant illustration.
> * * *.

1. The Court of Appeals and respondent point to no explicit language empowering the Commission to order the building of union stations, but, instead, rely upon various inapt provisions added by the Transportation Act, 1920, or upon provisions of uncertain scope contained in the early Act, originally put there and also reenacted in 1920, without thought of conferring any such authority

A review of the record discloses an apparently uniform view that at least prior to the 1920 amendments the Act to Regulate Commerce gave no authority to the Commission to compel the establishment of union stations. The Commission's report states:

> All parties concede that if we have the power to require the construction of a union station, it has come in the transportation Act, 1920 Prior to that enactment such power was clearly in the States. (R. 53, and footnote of State cases, R. 54.)

The decision of the California Supreme Court clearly shows its view that it was the 1920 amendments which divested the State Commission of authority theretofore possessed. And in this, the decision of the Court of Appeals of the District of Columbia apparently concurs. It rests broadly upon

the powers of the Commission as extended by the 1920 amendments and upon the decision of this Court in the *Los Angeles Station Case*, 264 U. S. 331, and other decisions commenting in a general way upon the Commission's enlarged supervisory control. In referring to the Act it specifically mentions paragraphs (18)–(21) of section 1 and paragraphs (3) and (4) of section 3. The Commission's authority under said paragraphs (18)–(21) in respect of the extension and abandondment of lines has already been mentioned and will be further discussed in a later chapter devoted to a detailed consideration of the *Los Angeles Station Case, supra.* Paragraphs (3) and (4) of section 3 will be particularly dealt with in this chapter.

Paragraph (4) empowers the Commission to require an owning carrier to permit the use by other carriers of its terminals, and tracks for a reasonable distance outside thereof. The authority granted by this paragraph is explicit in character in so far as its subject matter is concerned, but, obviously, authority to require one carrier to permit the use by other carriers of its terminals and terminal tracks is not authority to order the building of new union stations. It is true that the lower court stressed the fact that a large part of the land necessary for the station is now carrier-owned. (R. 168.) This land was acquired after the decision in the *Los Angeles Station Case* (R. 25) and doubtless in anticipation of excessive prices in the event that either the California Commission or this Commission should make,

and attempt to enforce, an order requiring the building of the station. But it is not clear what bearing the ownership of this land within the State of California has as indicating that jurisdiction is in this Commission rather than in the State Commission. Authority must still be found empowering this Commission to order the carriers to construct and establish the new union station, entailing, too, the abandonment of their individual stations and lines and rights of way used in connection therewith.

Paragraph (3) of section 3 provides as follows:

> All carriers * * * shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, or charges between such connecting lines, or unduly prejudice any such connecting lines in the distribution of traffic that is not specifically routed by the shipper.

The Court of Appeals after stating that this paragraph vests the Commission with almost unlimited power in the matter of establishing terminals and union stations goes on to say:

> The term "reasonable, proper and equal facilities" is broad and comprehensive enough to include not only trackage but adequate station facilities. (R. 169.)

The phrase referred to is broad, but it is not comprehensive in the sense of all-including language that leaves no doubt of Congress' intention. In fact we believe that if Congress had intended to clothe the Commission with such far reaching authority as that of requiring the establishment of union stations it would not have employed language of indefinite and unsettled scope and meaning, but would have stated its intention in plain and unmistakable terms. In this connection it should be noted that not only is the provision requiring carriers "to afford all reasonable, proper and equal facilities for the interchange of traffic" one that is of indefinite and uncertain scope and found in association with provisions mostly directed against discrimination, but also it is directed to the carriers and not the Commission. The Court of Appeals points to no provision giving the Commission authority to enforce the duties laid upon the carriers by the paragraph, but respondent relies upon a provision contained in section 12, which reads:

> * * * and the Commission is hereby authorized and required to execute and enforce the provisions of this Act; * * * pp. 7-8, *supra*).[2]

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[2] Added by amendment of 1889 (25 Stat. 855, 858), the whole addition reading as follows:

"and the Commission is hereby authorized and required to execute and enforce the provisions of this Act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to

The suggestion that Congress, in legislating with respect to the establishment of new union stations—a new field of federal regulatory authority and one intimately affecting local interests—would have left both the duty of the carries to establish, and the power of the Commission to enforce such duty, to be inferred from provisions of such uncertain scope and application, appears to us to have slight persuasive force.

In *United States* v. *Penna. R. R. Co.*, 242 U. S. 208, involving the question as to whether the Commission had authority to require a carrier to furnish special equipment, namely, tank cars, it was urged and apparently accepted as a fact that it was the duty of carriers to furnish upon reasonable request such cars as are reasonably necessary for handling the normal traffic. (Pp. 218, 219.) The controversy in the case centered, not so much around the duty of carriers to provide as it did upon the Commission's authority to enforce the duty (p. 219); and the Commission's authority under section 12 to execute and enforce the provisions of the Act and also its power under section 15 to prescribe just and reasonable "practices" were advanced as showing that it had such author-

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prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States."

ity. Referring to the Commission's authority under section 12 to enforce the Act, the Court indicated that the jurisdiction to enforce the carrier's duty was at common law in the Courts rather than under the statute and in the Commission. (P. 227.) Referring to the contention that the Commission's section 15 authority to condemn unreasonable practices and to prescribe reasonable practices in lieu thereof was applicable, the Court said, at page 229:

> Let us test the contention and see where it takes us. The request was for a special facility, a combination of package and car, and the question then is whether the neglect to provide it or to furnish it was a "practice" within the meaning of section 15. The far-reaching effect of an affirmative answer is instantly apparent, and there must be hesitation to declare it from the use of so inapt a word as "practice." Following a well-known rule of construction, we must rather suppose its association was intended to confine it to acts or conduct having the same purpose as its associates. And there were many such acts for which the word could provide—practices which confused the relation of shippers and carriers, burdened transportation, favored the large shipper and oppressed the small one. These have illustrations in decisions of the Commission. And this was purpose enough, remedied all that was

deemed evil in privately owned cars of any type. Beyond that it was not necessary to go; beyond that there were serious impediments to going; and we can not but believe that *if beyond that it was intended to go there would have been explicit declaration of the intent, with such provision as to notice and time and preparation as its consequences would demand—not ambushed in obscurity and suddenly disclosed by construction to turn accepted custom into delinquency, a construction that could be disputed and was disputed.* (Italics ours.)

It will be understood that under the scheme of the Act the Commission's authority—that is, its authority to enforce through its own proceedings and by its own orders—is not necessarily commensurate with the carriers' duties. Generally speaking, Commission authority is dealt with as a separate thing, and the degrees and kinds of its authority over a particular subject matter have been various. For example, one method of enforcing the provisions of the Act possessed by the Commission is its power to award reparation, and, while it has had this authority ever since its creation, its power to prescribe reasonable rates was not given it until some years later, and that was not extended to include minimum as well as maximum rates until 1920. And in respect of discrimination and undue prejudice, while the Commission could order its

removal, for many years it had to leave to the carriers the particular method of effecting its removal.

Borrowing from the language of the Court in the opinion last quoted from, it is apparent that in the instant case the provisions of section 3 (3) and section 12 have been lifted from obscurity "to turn accepted custom into delinquency." The lower court, while seemingly in full accord with the prevailing view mentioned in the Commission's report that, if the Commission had power to compel the establishment of new union stations, a power theretofore exercised by the States, it had come in the Transportation Act, 1920 (R. 169, 170), yet rests its decision that the Commission now has such power in large measure upon the provision making it the duty of carriers to afford all reasonable, proper, and equal facilities for the interchange of traffic, which provision has in substance been in the Act from the beginning. The second paragraph of section 3 of the original Act of 1887 (24 Stat. 379) reads as follows:

> Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as re-

quiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.[4]

As above stated, the general provision contained in section 12 authorizing the Commission to enforce the Act's provisions was added by amendment of 1889.

In *Kentucky & I. Bridge Co.* v. *Louisville & N. R. Co.*, 37 Fed. 567 (149 U. S. 777, appeal dismissed pursuant to 10th rule), it was held, among other things, that the provision making it the duty of carriers to afford all reasonable, proper, and equal facilities for the interchange of traffic did not require the defendant carriers to interchange traffic at a new point of connection with another railroad at which point it had no established depot, yards, and other facilities. At page 621 the opinion reads:

> * * * Neither this nor any other provision of the law requires of the common carrier of interstate commerce the duty of either forming new connections or of establishing new stations for the reception and delivery of freights. The act to regulate commerce deals with such common carriers as it finds them, and leaves to them full discretion as to what extensions they will make of their lines, the connections they may form, and the yards

[4] In lieu of the last sentence paragraph (4) was substituted by the 1920 amendment and some minor changes made in the earlier portion of the provision. (See section 3, (3) and (4), p. 6, *supra*.

> and depots they may choose to establish. * * * Congress has certainly not undertaken, even if they possessed the power, to deal with such matters.

In *Alabama Ry.* v. *Jackson Ry.*, 271 U. S. 244, involving the question whether the Commission had power to order switching connections between the track of one railroad and the track of another at a point outside a city, into which the latter road had access, this Court gave consideration to said paragraph (3) of section 3 and the Commission's power in the premises, and said, at pages 248–249:

> The Act to Regulate Commerce, February 4, 1887, c. 104, 24 Stat. 379, provided, by what is now paragraph 3 of section 3, that carriers shall "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines;" but it did not confer upon the Commission authority to permit and to require the construction of the physical connection needed to effectuate such interchange. * * * It was not until Transportation Act, 1920, c. 91, 41 Stat. 456, conferred upon the Commission additional authority, that it acquired full power over connections between interstate carriers. * * *.

As will later be shown in more detail the Court thereafter went on to hold that power to order *physical connections between lines* had vested in the Commission by reason of the added power given it in 1920 to order extension of lines and to require

one carrier to permit another to use its terminal facilities "including main-line track for a reasonable distance outside of such terminals." (P. 249.)

There appears, then, to be nothing in this record or in the decisions to dispute what is, in any event, probably axiomatic: That the 1887 Act as amended in 1889 did not clothe the Commission with power to compel the carriers to establish new union stations in lieu of their existing stations. Yet the then Act contained the provisions in section 3 making it the duty of carriers to afford all reasonable, proper, and equal facilities for the interchange of traffic and also the general provision in section 12 for enforcement of the Act's provisions. The question is then as to what effect can be properly attributed to the 1920 amendments as clothing the Commission with power to require the establishment of new union stations, a power which was theretofore vested in the States and its exercise approved by many State court decisions. (R. 54, 169.) That question will be dealt with in the succeeding chapters but, in passing, attention is called to the statement appearing in the footnote below,[4] made by

[4] The following appears in vol. 58, p. 9, Congressional Record, 66th Cong., 1st sess., Nov. 15, 1919, pp. 8578, et seq.:

Mr. McClintic. Mr. Chairman, I offer the following amendment which I send to the desk and ask to have read.

"The clerk read as follows:

"Amendment offered by Mr. McClintic: Page 55, line 9, after the word "prescribe," insert:

"'*Provided further*, That the commission is hereby given authority to require a carrier to maintain his present ar-

Congressman Esch, Chairman of the House Committee, and in charge of the bill (known as Esch-

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rangement or to make new arrangements relative to the joint use of depots, upon such terms as shall be found by the commission to be just and reasonable. No carrier shall be allowed to discontinue the use of a depot in connection with another carrier until proper application has been made to the commission.'"

(There followed a statement by Mr. McClintic showing that his amendment was induced by apprehension that the advantages of joint depots enjoyed by the public under the Railroad Administration would be denied after termination of federal control and that the proposed bill took from the State commissions their powers in respect thereof.)

"Mr. ESCH (8579). Mr. Chairman, the matter which the gentleman from Oklahoma seeks to reach by his amendment lies almost wholly within the police power of the several States. There have been amendments offered to this bill seeking to preserve such police powers. The committee in framing the bill sought not to encroach upon such powers. The matter of depots and joint use of depots is practically in the jurisdiction of the State commissions, and all but one of the States have such commissions. In such small matters, the detail should be left within the jurisdiction of the State authorities, who know the conditions, and know how best to meet the needs. There is, however, a provision in this bill providing for the joint use of terminals.

"Mr. MCCLINTIC. Will the gentleman yield?

"Mr. ESCH. But that power will be exercised, I have no doubt, mainly in connection with the terminals in the large cities and in the congested centers. Due to the prohibitive cost of land, it is necessary to get a greater use out of *existing terminals* by giving to some regulatory authority, like the Interstate Commerce Commission, the right to order the joint use of such terminals, but that that power should be exercised as to depots in small communities is not contemplated. That power should be left, as we leave it, to the regulatory bodies of the several States. I now yield to the gentleman from Oklahoma. (Italics ours.)

Cummins Bill) which after some changes became the Transportation Act, 1920. While made during

"Mr. McClintic. Does the gentleman think that the State commissions will have a sufficient amount of jurisdiction to handle a question of this kind?

"Mr. Esch. Most certainly. They do under the powers granted in my State, and I think it is true in many States. I do not know the situation in Oklahoma.

"Mr. McClintic. The gentleman does not feel that this bill takes away any of their jurisdiction?

"Mr. Esch. No.

"Mr. McClintic. Mr. Chairman, upon the statement of the chairman of the committee I will be glad to withdraw the amendment.

"The Chairman. The gentleman from Oklahoma asks unanimous consent to withdraw his amendment. Is there objection?

"Mr. Linthicum. Mr. Chairman, I object.

* * * * *

"The Chairman (8582). The question is on agreeing to to the amendment offered by the gentleman from Oklahoma (Mr. McClintic).

"The question was taken and the amendment was rejected."

The bill (H. R. 10453) had been reported by the House with its report, No. 456 (Cong. Rec., vol. 58, 66th Cong., 1st sess., p. 8265), and was debated (Ibid. 8309–8692). In the proposed bill under consideration at the time the above remarks were made by Congressman Esch the provision in respect of joint use of terminals (H. R. 10453, sec. 405 (2)) were not the same as finally enacted. The provisions of the original bill and the changes made by the Senate amendments and the conference committee are outlined in the following, taken from House Report No. 650 (66th Cong., 2d sess.) submitted by Mr. Esch with H. R. 10453 from committee of conference (59th Cong. Rec. p. 3263; MacVeagh on Transportation Act, 1920, p. 252):

"Section 405 of the House bill provided that the commission might require the terminal of any carrier to be open to the traffic of other carriers upon such terms and for such

debate, it is in the nature of an explanatory statement and is like the statement considered by this court in *Duplex* v. *Deering*, 254 U. S. 443, 474–477, made by a member in charge of a bill under similar circumstances. It was considered in *North Carolina Corp. Comm.* v. *Southern Ry.*, 185 N. C. 435, and by the Commission in its report in this case. (R. 56.) The statement in question shows not only the view that authority over union stations was in the State Commissions prior to 1920, but also that the committee, in framing the new bill, had sought not to encroach on such State authority, and that while there was a provision in respect of joint use of existing terminals, its purpose was to empower the Commission to conserve revenues from the standpoint of the whole transportation service by making full use of existing facilities, although owned by an individual carrier. Such power of

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compensation as the commission might prescribe. The Senate amendment, in section 11, provided that the transportation board might require one carrier to permit another carrier to use its 'terminal or other facilities, including main-line track or tracks for a reasonable distance outside of such terminals,' on such terms as the carriers might agree on or as the board might fix. Section 405 of the conference bill contains provisions on this subject similar to those in the Senate amendment. It is provided that the commission, if it is found to be in the public interest and practicable, may require one carrier to allow another to use its terminal facilities, 'including main-line track or tracks for a reasonable distance outside of such terminal,' on such terms as the carriers may agree upon or as the commission may fix, subject to the right, however, of the carrier whose terminal facilities are thus thrown open to sue for any damages sustained or any compensation owed."

conserving carrier revenues by requiring joint use of existing terminals certainly does not indicate a power to order the carriers to incur a heavy additional drain on their revenues by scrapping their existing terminals and works and constructing a new union station. While there may be instances where such would promote the interests of the community and even the convenience of the traveling public, the power to initiate is left with the carriers or the State, subject, however, to the indirect "means of control" possessed by the Commission (*Los Angeles Station Case* and *Lehigh Valley R. Co.* v. *P. U. Comm.*, discussed infra) to prevent such projects, if so expensive as to impair the carriers' ability to perform their duties to the public—another power of the Commission directed toward the conservation of revenues.

Also since this chapter deals particularly with paragraphs (3) and (4) of section 3, it is not out of place to give consideration to the proper interpretation of those paragraphs as construed together.

It has been above shown that in *Alabama Ry.* v. *Jackson Ry.*, 271 U. S. 244, this Court in effect said that, while the duty of carriers under paragraph (3) to afford reasonable and equal facilities for the interchange of traffic existed under the original Act, the Act did not confer on the Commission the power to order physical connection between the tracks of railroads needed to effectuate such interchange. Thereafter, at page 249, the Court said:

> * * * It was not until Transportation Act, 1920, c. 91, 41 Stat. 456, conferred upon the Commission additional authority, that it acquired full power over connections between interstate carriers. By paragraphs 18–20 added to section 1, it vested in the Commission power to authorize constructions or extensions of lines, although the railroad is located wholly within one State; and by paragraph 21 authorized the Commission to require the carrier "to extend its line or lines." By paragraph 4 of section 3 it empowered the Commission to require one such carrier to permit another to use its terminal facilities "including main-line track or tracks for a reasonable distance outside of such terminal."

And again, at page 250, the Court said:

> * * * Moreover, the establishment of junctions between the main lines of independent carriers is commonly connected with the establishment of through routes and the interchange of car services, and is often but a step toward the joint use of tracks. * * *.

The fact that the Commission has the power to order reasonable facilities for interchange of traffic in the nature of a physical connection between the main line tracks of carriers, does not, as claimed by respondent, make its disclaimer of jurisdiction to compel carriers to establish new union stations one that merely distinguishes between big and little duties. The power to order physical con-

nections between the main-line tracks of carriers is an essential incident to the express powers of the Commission to require extensions of lines and joint use of track and to require the establishment of through routes. Here the union station is the principal thing and the rearrangement of track and joint use thereof are the incidents. And the Commission, the body presumably best fitted to know, has discovered no need for a power to order the establishment of union stations as incidental to the effective exercise of powers expressly conferred upon it. Moreover, a power to compel the installation of new union stations would trench on State authority, whereas, as pointed out in *Alabama Ry.* v. *Jackson Ry., supra,* the power to order physical connection between the main lines of railroads does not. At page 249 of said decision the Court refers to paragraph (22) of section 1, which excludes from the Commission's authority over the extension of lines "spur, industrial, team, switching, or side tracks located wholly within one State" and states that it is clear that the connection here in question is not a track of that character. That is, the Court makes clear that the construction given by it to the statute does not trench on State authority beyond what was contemplated by the statute.

Finally it is clear that the power claimed for the Commission under paragraph (3) to require carriers cooperatively to acquire new land and construct thereon a new union station, entailing, too, complete abandonment of existing individual termi-

nals and lines, is a more, rather than a less, drastic power both in its effect on the carrier and on local interests than that possessed by the Commission under paragraph (4) to require one carrier to permit the use of its terminal by another, for proper compensation. In conferring the latter power by said paragraph (4), Congress recognized the need for clear and unmistakable language, including special provisions for determining the compensation to be received by owning carriers. Surely, if and when Congress decides to empower the Commission to require carriers to cooperate in the establishment of new union stations, it will likewise do so in clear terms, including special provisions, since, coupled with any such joint project, there will necessarily be involved the problem of properly coordinating the individual investments with the use to be made by each carrier of the joint facilities, or of compensating carriers by way of money return, where individual use of the joint facilities is not commensurate with individual investment.

2. The decision of this Court, in the Los Angeles Station Case, that the Commission has "means of control over installation of such new union station" in that its permission for incidental extensions and abandonments of lines and for issuance of new securities, if needed, must first be obtained, manifests that Commission authority is indirect and restrictive and that it is not a mandatory authority to order the building of new union stations

The closing paragraph of the opinion of the Court of Appeals reads as follows (R. 170):

> The procedure adopted by the City of Los Angeles in applying to the Interstate Commerce Commission for an order requiring the carriers to establish the union station in question was approved in the concluding words of the opinion in the Los Angeles Case, where the court said: "We were advised by statements at the bar that, after the California Supreme Court handed down its decision in this case, the City of Los Angeles filed a petition with the Interstate Commerce Commission asking for an order to provide, maintain and use a union station; that a hearing followed and that, pending the decision in this court, the matter is held under consideration. For the reasons given, we think the course taken by the City of Los Angeles was the correct one."

We believe that the balance of the concluding paragraph of this court's decision in the *Los Angeles Case* (*R. R. Comm.* v. *Southern Pac. Co.*, 264 U. S. 331) must be read to comprehend its real holding. The whole paragraph reads as follows:

> For the reasons given, we think the course taken by the City of Los Angeles was the correct one. Until the Interstate Commerce Commission shall have acted under paragraphs 18 to 21 of section 402 of the Transportation Act, the respondent railways can not be required to provide a new interstate union station and to extend their main tracks thereto as ordered by the State Railroad Commission.

Since said paragraphs (18) to (21), so referred to by the Court; merely require that Commission authority must be obtained for any extension or abandonment of lines, the last sentence above quoted indicates that, in the field of new union stations, Commission authority is not direct and initiative in character but is only an indirect and restrictive power arising from the fact that its authority must be had before the rearrangement of track that would be incidental to a new union station can be undertaken.

That this last sentence contains the essential holding upon which the Court's decision rests seems certain, not only from its position at the very end of the opinion, but from the fact that during the course of the opinion it is in substance three times repeated.

Firstly. At page 344 the Court, in discussing the contention that the power given the Federal Commission by paragraph (4) of section 3 to require an owning carrier to permit the use of its terminals and tracks by another carrier did not include the installation of new union stations at new sites, said:

> This would be giving power to the Interstate Commerce Commission to provide for a small and contracted union station of interstate carriers limited to the terminals of one carrier, and would leave the larger and more important union stations of interstate carriers to the control of state commissions. We think, however, that *means of control* over

> installation of such new union stations for interstate carriers is given to the Interstate Commerce Commission in amended paragraphs (18 to 21) of sec. 402. (Italics ours.)

That the Court did not consider that such power as the Commission had over new union stations came to it through said paragraph (4) of section 3 is shown by its immediate reference to said paragraphs (18) to (21). That it considered that said power was not a direct and mandatory power to order the installation of new union stations, but rather an indirect and restrictive authority, is shown by its significant use of the term "means of control" and likewise by the very nature of the power possessed by the Commission under paragraphs (18) to (21). In the sentence following the above quotation the opinion describes the provisions of those paragraphs and shows that what was called for thereby was the Commission's certificate of authority for extensions or abandonments of lines, which certificate could only be given, at least as to extensions, upon finding by the Commission that the expense involved would not impair the carrier's ability to perform its duty to the public. Directly succeeding this, the Court said:

> Such a certificate is, we think, necessary in the construction of a new interstate union station which involves a substantial and expensive extension of the main tracks or lines of interstate carriers who theretofore have maintained separate terminals.

Secondly. Thereafter the Court discussed the contention made in the case that the extensions of lines referred to in paragraphs (18) to (21) were only those opening up new territory and were not intended to include such as were merely incidental to the rearranging of terminals. It disagreed with that contention (344–345), stating that it was confirmed in its view by the succeeding paragraph (22) which excepts from Commission authority "the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State," thereby showing the legislative intention to retain the more substantial changes in main tracks within the control of the Federal Commission. Continuing, the decision gives recognition to the fact that there would be instances when the State commission could require union stations without the necessity of this Commission's authority for incidental changes in track. It reads:

> * * * One might, too, readily conceive of railroad crossings or connections of *interstate* carriers in which the exercise by a state commission of the power to direct the construction of merely local union stations or terminals without extensions of main tracks and substantial capital outlay should be regarded as an ordinary exercise of the police power of the State for the public convenience and would not trench upon the power and supervision of the Interstate Commerce

Commission in securing proper regulation of an interchange of interstate traffic or passengers. Only a lawful order of the Interstate Commerce Commission would raise a question of the power of a state commission in such cases, as the proviso of paragraph 17, section 402 of the Transportation Act shows:

"That nothing in this Act shall impair or affect the right of a State, in the exercise of its police power to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this Act." (Italics ours.)

The immediately succeeding paragraph shows that the kind of "lawful order of the Interstate Commerce Commission" which the court had in mind, was not an affirmative order requiring the building of union stations. It reads:

But there is a great difference between such relocation of tracks or local union stations and what is proposed here. The differences are more than that of mere degree; they and their consequences are so marked as to constitute a change in kind. They come within paragraphs 18 to 21 of section 402 and require a certificate of the Interstate Commerce Commission as a condition precedent to the validity of any action by the carriers or of any order by the State Commission.

Here, then, for the second time, the court shows that the nature of Commission authority is indirect, that is, that its permission for incidental rearrangement of main line track must first be had before the establishment of a union station can be undertaken. Moreover, it should be particularly noted that the above-quoted passages of the opinion recognize that the installation by interstate carriers of a merely local union station, not entailing extensions of main track or substantial outlay of capital, would not trench upon the authority of the Federal Commission in securing proper regulation of an interchange of interstate traffic or passengers, and, therefore, could be ordered by a State Commission without need for obtaining the Federal Commission's permission for extension and abandonment of tracks under said paragraphs (18) to (21). Obviously, if Commission authority operated directly upon the union station itself rather than as a means of control through its authority over incidental abandonments of track and extensions of track, the latter requiring finding by the Commission that the expense involved would not impair the financial stability of the carriers, such authority would attach whether the changes in track in connection with the installation of a union station were in respect of main track or whether or not the relocation of track and kind of station to be constructed entailed substantial outlay of capital.

Thirdly: In concluding its opinion, as heretofore said, the Court approved the course taken by the

City of Los Angeles in applying to this Commission for an order to provide, maintain, and use a union station, but the last paragraph clearly, and for the third time, shows that the nature of the prerequisite order of the Commission was merely its permissive order or certificate under said paragraphs (18) to (21) granting authority for the rearrangement of main-line track that would be incidental to the establishment of the union station. It is again quoted, to wit:

> For the reasons given, we think the course taken by the city of Los Angeles was the correct one. Until the Interstate Commerce Commission shall have acted under paragraphs 18 to 21 of section 402 of the Transportation Act, the respondent railways can not be required to provide a new interstate union station and to extend their main tracks thereto as ordered by the State Railroad Commission.

It seems clear that, if the Commission had been regarded as having a direct power to require the establishment of union stations to replace existing terminals, the indirect "means of control" vested in it by Congress through its authority over incidental relocation of tracks under paragraphs (18) to (21) would not have been repeatedly referred to. While the Court discussed provisions of the amendments made to the Act by the Transportation Act, 1920, other than paragraphs (18) to (21), its purpose, it seems clear, was to show the generally enlarged supervisory control of the Commission

as demonstrating that, despite the absence of direct power over new union stations, nevertheless, where the installation of such a station would trench on the direct power of the Commission with respect to extensions and abandonments of lines and maintenance of the carriers' financial stability, it was the Congressional intent that Commission action within its said express field should be a condition precedent, even though it might operate to control and restrict a State within its field of intrastate regulation. For example, at page 347, the Court, after pointing to the fact that paragraph (21) of section 1 requires a finding, before any extensions of lines may be authorized or ordered that the expense involved will not impair the ability of the carriers to perform their duty to the public, goes on to discuss another means of control possessed by the Commission. Referring to the Commission's authority under section 20a of the Act to forbid or approve the issuance of new securities, the opinion reads:

> * * * This is, of course, *in pari materia* with the restriction of paragraph 21 of section 402 to prevent a possible impairment of the financial ability of interstate carriers to discharge their interstate commerce duties. Such a heavy burden as that involved in this new union station and the main track changes and extensions and other accessories would in all probability require the three railways to issue new capital securities,

and this could not be done without the approval of the Interstate Commerce Commission. To be sure this provision only becomes operative when securities have to be issued and would not, of itself, prevent action by a state commission until such securities are seen to be necessary, but the provision indicates the general congressional plan.

The congressional plan with respect to issuance of securities was to give the Commission an indirect and restrictive control over projects of the railroads through its authority to approve or disapprove the issuance of securities necessary to finance such projects, and this corroborates what is in any event clearly shown, namely, that the means of control, with which the Court found the Commission clothed, is of indirect and restrictive character and not a direct and mandatory power to require the construction of new union passenger stations. If anything further is needed to show that the decision merely holds that the Commission's power to control action of the States in respect of union stations is of indirect character, resting chiefly upon its authority to prevent financial commitments that might impair the carriers' ability to perform their duties to the public, it is afforded by this court's reference in *Lehigh Valley R. Co.* v. *Bd. of P. U. Commission,* 278 U. S. 24, to its said earlier decision. The *Lehigh Valley Case* involved an order of the New Jersey Commission requiring the Lehigh Valley Railroad to eliminate two grade cross-

ings and to substitute therefor one overhead crossing at an estimated cost of $324,000. In support of its claim that the order was invalid, one of the carrier's contentions was that the expenditure was so unreasonable as to constitute a burden on interstate commerce in violation of the Transportation Act. In upholding the order of the State commission the court, among other things, said:

> * * * It is not necessary for us to controvert the proposition that *unreasonably extravagant* grade crossings are to be enjoined not only as violations of the Fourteenth Amendment but also as forbidden by the Transportation Act.
>
> But we can not see that the rule invoked from either will be violated by the order now made. The care of grade crossings is peculiarly within the police power of the States, *Commission* v. *Pacific Co.*, 264 U. S. 331, 341, and if it is seriously contended that the cost of this grade crossing is such as to interfere with or *impair economical management* of the railroad, this should be made clear. It was certainly not intended by the Transportation Act to take from the States or to thrust upon the Interstate Commerce Commission investigation into parochial matters like this, unless by reason of their effect *on economical management and service,* their general bearing is clear. *Railroad Commission* v. *Southern Pacific Company,* 264 U. S. 331. The latter case makes a distinction between the local character of the usual elimi-

> nation of grade crossings and the vital character from the *standpoint of finance of the investment of large sums* in the erection of a Union Station. (Italics ours.)

To sum up, then, while the decision in *R. R. Comm.* v. *So. Pac. Co., supra,* gave full effect to the Commission's expressly conferred power with respect to lines and preventing waste of the carriers' revenues, even where its exercise would control and restrict the power of the States with respect to installation of union stations, it discovered no congressional intent, by implication from those powers or the general regulatory provisions of the Act, to give to the Commission a direct and mandatory power in the new field of union passenger stations.

3. The decision in the Los Angeles Station Case, indicating that the Commission's control over the installation of new union stations was of permissive and restrictive rather than mandatory character, gives effect to the fact that, while the 1920 amendments to the Act extended the Federal regulatory authority in marked degree, still, and doubtless for that very reason, it was the congressional plan to give to the Commission a restrictive instead of initiative power over subject matter intimately affecting local interests or constituting extensive invasions into a field theretofore left to private initiative and managerial discretion, whenever power of that character was fitted to accomplish the end in view

That Congress, in entering into new fields of regulation by the 1920 amendments, intended not to trench on State authority further than as essential to give the Commission full authority to carry out

the powers which were expressly conferred upon it is evidenced by numerous provisions, the most important of which was discussed in the *Los Angeles Station Case, supra,* p. 346, and reads:

> That nothing in this Act shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this Act. (Sec. 1 (17).)

No apparent need exists to read into the Act a power so extensively affecting local interests as that of requiring the establishment of new union stations. The indirect means of control possessed by the Commission through its authority over the relocation of track that would be necessary in establishing union stations enables it to prevent waste of revenue that might impair the carriers' ability to perform their common-carrier service. *Lehigh Valley R. Co.* v. *Pub. Utility Commn.,* 278 U. S. 24.

That Congress, in those instances, where it determinded that it was necessary to trench on State authority in order to attain its objectives, used unmistakable language, including provisions for notifying and securing the views of State authorities, is evidenced by the provisions giving the Commission authority to deal with intrastate rates which burden interstate commerce (Sec. 13 (3)) and by

the provisions giving the Commission authority in respect of the consolidation of railroad and telephone properties (Sec. 5 (5) and (9)). That it also used explicit language, where the power conferred, further extended the Commission's authority into the field of managerial initiative is shown by the above-mentioned provisions with respect to joint use of terminals (Sec. 3 (4)) by the provisions giving the Commission power to fix divisions of joint rates (Sec. 15 (6)) and by the recapture provisions (Sec. 15a (5)–(18)). Not only are provisions of this character lacking but the subject of new union stations is not mentioned at all.

That Congress' entry into a new field has customarily been one of cautious approach, giving to the Commission only a limited power in the first instance, is borne out by many instances. Not until 1920 was the Commission given direct authority to act on intrastate rates that discriminated against interstate commerce. The Commission had theretofore had an indirect means of control. *Houston & Texas R. Co.* v. *United States* (*The Shreveport Case*), 234 U. S. 342. When Congress decided to clothe it with authority to operate directly on intrastate rates it did so in plain and unmistakable language, as heretofore said. *Wisconsin R. R. Comm.* v. *C., B. & Q. R. Co.*, 257 U. S. 563, 584. Other instances are those of the gradual development of the Commission's power to establish through routes and to fix divisions of joint rates. (34 Stat. 584; 36 Stat. 539; 37 Stat. 566; 41 Stat.

484.) And it must not be forgotten that not until the Hepburn Act of 1906 was the Commission empowered to prescribe rates for the future, and not until that same Act did the Commission's orders entail penalties for disobedience. When the need for making the Commission's orders "self-executing" was finally demonstrated to the satisfaction of Congress, then provisions were enacted prescribing heavy penalties in the event of disobedience. *Los Angeles Valuation Case,* 273 U. S. 299, 309.

This Court's decision in *R. R. Comm. of Calif.* v. *So. Pac. Ry., supra,* discussed in the last chapter, shows that it was the Congressional plan, not to give the Commission power to order, but only to give it the power to approve or disapprove, the establishment of union stations, such power coming to it indirectly through its authority over the rearrangement of tracks and over the issuance of securities if needed, and through the duty placed upon it not to grant its authority in either case except upon findings that the expense involved will not impair the carriers' ability to perform their duties to the public. This permissive and restrictive, instead of compulsory, power is in line with Congress' past policy of conferring a limited power when entering new fields, and Congress' reasons are well demonstrated in the provisions with which we are here directly concerned and other provisions added by the Transportation Act.

While paragraphs (18)–(21) of section 1 give the Commission power to order as well as authorize ex-

tensions of lines, its authority with respect to abandonment of lines is only permissive. The distinction seems significant. The continued operation of unprofitable branch lines may seriously deplete the revenues of interstate carriers, but their abandonment affects intimately the local interests and, while Congress considered it necessary to clothe the Commission with authority to pass upon and permit abandonments on application of the carriers, it did not see fit to empower the Commission to force abandonments on the managerial discretion of the carriers. Similarly, although Congress considered it necessary to require the carriers to petition the Commission before issuing new securities and to authorize the Commission to approve or disapprove such applications, it did not further invade the field of managerial discretion by giving the Commission an initiative and mandatory authorty to order the issuance of new securities.

Section 5 of the Act presents another outstanding instance of authority not of compulsory character conferred upon the Commission. Thereby the Commission is directed to prepare a plan for the consolidation of the railroads into a limited number of systems, and consolidations by the carriers must be approved by the Commission, but the Commission is not empowered to order consolidations. The section is clear evidence of the view of Congress that consolidations of the railroads into a limited number of systems is desirable in the interest of an efficient transportation service and that the Com-

mission should have supervisory control thereof. Yet Congress stopped short of giving the Commission compulsory powers. *Snyder* v. *N. Y. C. & St. L. R. Co.* (118 Ohio St. 72), 160 N. E. 615, 619; 278 U. S. 578. And the reasons are very apparent. Compulsory powers in such a field would mean that the regulatory authority would be substituted for managerial discretion to the extent of requiring the carriers to divest themselves of properties now owned, to acquire new properties and, generally, to cooperate with other separate corporations to the end of merging themselves into a single company; and, while Congress may ultimately conclude this to be warranted and necessary, it has not yet reached the conclusion that such invasion of the field of private initiative is desirable. Similarly, power in the Commission to require the establishment of new union stations would mean that the carriers could be compelled by an administrative body to divest themselves of existing terminals and rights of way, to acquire new lands and dedicate same to the public service, and to cooperate with other carriers in constructing a union station for common use. Furthermore, in the case of new union stations, there would be entailed the disruption of local interests and interference in civic management, that has been above pointed out. These matters are referred to, not with any thought that Congress could not have clothed the Commission with full power in the field of union stations, but for the purpose of again emphasizing that,

while the authority possessed by the Commission to refuse its permission for the installation of a new union station merely operates to preserve the existing status, the power claimed for it to compel the establishment of union stations would constitute a marked invasion of a new field, trenching far more seriously on local authority.

Repeated decisions of this Court have commented upon the fact that the amendments made to the Act by the Transportation Act, 1920, effected marked departures from the earlier purposes of federal regulation. But this Court has recognized that the power conferred on the Commission by many of those amendments is only a power to permit or authorize and not a mandatory power. *Dayton-Goose Creek Ry.* v. *U. S.*, 263 U. S. 456, 478; *R. R. Comm.* v. *So. Pac. Co.*, 264 U. S. 331, 344, 347; *Chicago Junction Case*, 264 U. S. 258; *Venner* v. *Michigan Cent. R. Co.*, 271 U. S. 127; *New England Divisions Case*, 261 U. S. 184 (footnote 8, p. 190); *Snyder* v. *N. Y., C. & St. L. R. Co.*, 160 N. E. 615, 278 U. S. 578; *Texas* v. *East Tex. R. Co.*, 258 U. S. 204, 217; *Colorado* v. *United States*, 271 U. S. 153, 165. The very fact that Congress was entering into new fields best discloses its reason for clothing the Commission only with such limited powers. In this, Congress has followed its usual course. The history of the Act, as gradually developed by its amendments, shows that Congress has customarily proceeded cautiously, giving to the Commission a limited power in the

first instance, and subsequently, when and if shown to be necessary, enlarging that power.

4. If it should be considered that the State has been altogether excluded and is without power to order installation of the new union station even after obtaining this Commission's certificates in respect of relocation of main-line track, still this Commission's mere indirect and restrictive authority to prevent a change in existing status would not be thereby changed into a mandatory power to force new union stations in lieu of existing stations upon the carriers and the cities

It is well settled that, while the federal authority under the Commerce clause is paramount even though trenching upon the reserved power of a State, yet where Congress' occupation of a field is only partial a State is left free to act as to matters not covered by or repugnant to the Federal legislation. *Savage* v. *Jones,* 225 U. S. 501, 533, and cases therein cited. *Sligh* v. *Kirkwood,* 237 U. S. 52; *M. K. & T. Ry.* v. *Harris,* 234 U. S. 412; *Missouri Pac. Ry.* v. *Larrabee Flour Mills Co.,* 211 U. S. 612. It is also settled that federal legislation so trenching upon the power of a State will be strictly construed, that is, that it will be taken to supersede State authority only to the extent necessary to avoid defeating express provisions of the Acts of Congress. *M. K. & T. Ry.* v. *Haber,* 169 U. S. 613, 623; *Savage* v. *Jones, supra,* 533; *Ill. Cent. R. R. Co.* v. *Pub. Utilities Comm.,* 245 U. S. 493, 510; *Lehigh Valley R. Co.* v. *Pub. Utility Comm.,* 278 U. S. 24, 35. And yet it appears that there may be cases

where the federal legislation, although not covering the precise ground of the State Act or the full possible ground (at least in express language) in respect of the subject matter, still shows a plain purpose to divest the State of all authority, making the federal Act the uniform and exclusive legislation and leaving the subject matter untrammeled except as legislated upon by the federal Act. For example, in *N. Y. Cent. R. Co.* v. *Winfield,* 244 U. S. 147, involving the New York Workmen's Compensation Act, which provides for compensation even though injuries are not attributable to negligence of the carrier, and the Federal Employers' Liability Act, which provides no remedy in the absence of carrier negligence, the question was as to whether the State Act was entirely superseded, that is, as to whether its additional provision, compensating for injuries not attributable to an employer's negligence, was made inoperative by the federal Act. The Court held that the State Act was entirely superseded because the Federal Act covered the whole field. As to negligence, the view was that the Act covered this feature in that it evidenced an intention that there should be no compensation unless there was carrier negligence. This view of the court was, apparently, in large part based upon the history of the adoption of the Act, which disclosed a purpose that the National Act should be exclusive in the field, so that the law relating to the subject should be uniform.

Much to the same effect see *Prigg* v. *Pennsylvania*, 16 Pet. 536, 617.

In *Snyder* v. *New York, C. & St. L. R. Co.* (118 Ohio St. 72), 160 N. E. 615, the question was as to whether the Commission's authority to plan for and approve consolidations of the railroads, similar to its permissive authority over new union stations and likewise conferred by the Transportation Act, had superseded State authority in the field of railroad consolidations. There, the Supreme Court of Ohio held that the consolidation, pursuant to the laws of Ohio, New York, and other States, of 5 constituent railroad companies into a single new company was not violative of the consolidation paragraphs of the Interstate Commerce Act. Those paragraphs provide that the Commission shall, as soon as practicable, prepare a plan for the consolidation of the railroads into a limited number of systems; that it shall give due publicity to the tentative plan, and, after reasonable notice, including notices to the Governors of the States, and following hearings, it shall adopt a final plan for such consolidations. The paragraphs thereafter state that it shall be lawful for 2 or more carriers to consolidate, provided that the consolidation must be in harmony with the complete plan and must be approved by the Commission. But the Act does not make consolidations compulsory, and, apparently based in part on this lack of compulsory authority and in part on its view that the Act did not

confer power to approve isolated consolidations prior to the adoption of the complete plans, the Court reached the conclusion that the field was not occupied to the exclusion of State authority. In a per curiam decision of this Court (278 U. S. 578) the case was affirmed on the ground that the consolidation provisions of the Act had "not as yet become applicable to cases like this." From said ground, the inference seems to follow that when the Commission has adopted its plan of consolidation the authority of said States will be superseded. Such authority, was, of course, merely the corporation laws of those states, but the case suggests the interesting alternative questions as to whether, if certain State Commissions had authority to order consolidation, they could, by conforming to the Commission plan and obtaining its approval, order the carriers to consolidate in accordance therewith, or whether, in line with the doctrine of the *Winfield* and *Prigg cases,* the consolidation provisions of the Act, by not giving the Commission the power to compel consolidations pursuant to its plan and in other ways, have sufficiently evidenced the purpose of Congress that consolidation should not be forced upon the carriers.

Similarly, reverting to the matter of new union stations, the doctrine of the *Winfield Case* raises the question as to whether Congress may not have intended to supersede all State authority, despite the fact that it gave to the Commission only limited powers in the field. Commission authority is

purely permissive and restrictive as contrasted with the compulsory power of the California State Commission to order new union stations. The question is, then, as to whether it may be said that Congress, while not giving the Commission compulsory power, still has covered the whole subject matter by evidencing an intention that there should be no compulsory regulatory power, whether federal or state, in this field; and the answer to that question would seem to depend, as in the *Winfield Case,* upon whether or not the Act itself and the proceedings in Congress disclosed a purpose that the National legislation should be exclusive, to the end of uniformity.

Of course the holding in the *Los Angeles Station Case, supra,* to the effect that the Commission's permissive order or certificate for relocation of main track "is a condition precedent to the validity of any action by the carriers or of any order by the State Commission" looking to the establishment of the union station indicates that the State has only been superseded to the extent expressly required by the terms of the Act, that is, that the State can still act after the Commission has passed upon and approved the changes in track and expenditure involved, and that, therefore, the fact that Congress did not itself make provision for compelling the carriers to establish union stations is not to be taken as evidencing an intention to preclude the States from exercising compulsory power after receiving the prerequisite permissive certificate of this Com-

mission. And this, too, is borne out by the legislative history of the 1920 amendments set forth in the footnote at pp. 30–33, *supra*.

But even should it be considered that the State has been altogether excluded and is without authority to order the carriers to construct the station after securing the Commission certificate in respect of extensions and abandonments and expense involved, still that conclusion could not be the source of any implication that this Commission was clothed with compulsory power. Indeed the very doctrine that Congress by its silence shows an intention that a subject matter shall be free of legislation, state or Federal, in the particulars not specified in the Federal Act, would, if applied to this case, have to rest on the premise that Congress has not conferred upon the Commission such compulsory powers. However, aside from this, the marked difference between the mere permissive and restrictive authority of the Commission and a power to compel the establishment of union stations must be kept in mind. Power in the State to order the installation of stations after obtaining the Commission's certificate that the expense involved will not prejudice interstate commerce seems in harmony with the scheme of the Act to leave to local authority matters in respect whereof the local interests are vitally concerned. Whereas it would be entirely out of harmony with the Act to imply from this Commission's mere restrictive authority to prevent a change in existing status as to stations within the

cities a mandatory power to force upon the carriers and the cities the substitution of a union station at a new site, with all the disruption of existing arrangements and settled conditions that would flow therefrom.

Again giving consideration to the consolidation provisions of the Act, it is called to the Court's attention that, similarly as in the case of new union stations, the subject matter contemplates cooperative action by separate individual companies, and it is once more emphasized that in dealing with that subject matter, Congress gave to the Commission power to approve applications of the railroads for permission to effect consolidations but no compulsory authority. Certainly the fact that all state authority over interstate carriers in this field of consolidation may, when the Commission's plan becomes operative, be entirely excluded, could not be urged as changing the character of the authority given the Commission into an authority to force its plan of consolidation upon the carriers. As stated in *Snyder* v. *N. Y., C. & St. L. R. Co., supra,* at p. 619:

> * * * Nowhere in the Act is it declared that consolidations are compulsory and the present inquiries before the committee of Congress relate to the question whether it shall be the policy to make consolidations compulsory. * * *.

Just as it seems impossible to find in the Act compulsory authority to require consolidations so

likewise it seems impossible to find a mandatory power to compel the establishment of new union stations. And, to read into the Act authority of such character, would be to give it a construction contrary to the demonstrated policy of Congress, not only of developing the Commission's powers in new fields by gradual stages, but also of employing express language whenever the power conferred intimately affects local interests.

For the above reasons it is respectively submitted that the judgment of the lower court should be reversed.

DANIEL W. KNOWLTON,
For Interstate Commerce Commission.

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